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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE HELLENIC REPUBLIC, a Foreign Country, THE HELLENIC REPUBLIC NATIONAL AGRICULTURAL INSURANCE INSTITUTE, a Greek Institution, THE SOCIAL INSURANCE INSTITUTE OF GREECE, a Greek Institution,

Petitioners,

v.

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, THE CHICAGO REGIONAL ORGAN AND TISSUE BANK, DR. FREDERICK MERKEL, JUNE D. BAJOR, and SOUTH CHICAGO COMMUNITY HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER

HUGH C. GRIFFIN *
WILLIAM C. ANDERSON
CATALINA J. SUGAYAN
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

Attorneys for Respondent
RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit properly affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division denying the Petitioners' Motion to Quash Summons and to Dismiss on the ground that the "commercial activity" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.*, applies to this action arising out of a contract for medical goods and services.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed.[1]

[1] In compliance with Supreme Court Rule 28.1, Respondent Rush-Presbyterian-St. Luke's Medical Center states that it is a not-for-profit corporation and that it is affiliated with the following Hospitals and Colleges: Rush North Shore Medical Center, Copley Memorial Hospital, Bethany Hospital, Central DuPage Hospital, Christ Hospital and Medical Center, Elmhurst Memorial Hospital, Galesburg Cottage Hospital, Grant Hospital of Chicago, LaGrange Memorial Hospital, LaPorte Hospital, MacNeal Hospital, Marianjoy Rehabilitation Center, Miles Square Health Center, St. Mary's Hospital, Swedish Covenant Hospital, West Suburban Hospital Medical Center, Beloit College, Carleton College, Colorado College, Cornell College, Fisk University, Grinnell College, Illinois Benedictine College, Illinois Institute of Technology, Knox College, Lake Forest College, Lawrence University, Macalester College, Monmouth College, North Central College, Ripon College, Wheaton College.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 690 F.Supp. 682 (N.D. Ill. 1988). The opinion of the United States Court of Appeals for the Seventh Circuit is unreported at this time. Copies of the opinions of the District Court and Court of Appeals are contained in Petitioners' Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1989. The Petition for Writ of Certiorari was filed on August 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act is set forth in 28 U.S.C. §1602 *et seq.* The pertinent text of the Act is set forth in the Appendix.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals' decision, unanimously affirming the judgment of the District Court, is correct. There is no substantial federal question, no conflict in the Circuits and no other basis for further discretionary review by this Court.

1. PETITIONERS FAIL TO RAISE A SUBSTANTIAL QUESTION OF FEDERAL LAW.

Petitioners contend that this Court should grant a Writ of Certiorari because this case raises an important question of federal law. The important question of law proffered by Petitioners is "whether [Petitioners], in fulfilling their contractual and legal obligations to provide medical care to Greek citizens, exercised a governmental function or engaged in a commercial activity, as described in the Foreign Sovereign Immunities Act, by contracting to have kidney transplant operations performed upon [Greek] nationals in the United States". (Pet., p. 13).[2]

However, in determining whether there are special and important reasons for granting a Writ of Certiorari, this Court has stated that "this Court does not sit to satisfy a scholarly interest in such issues nor does it sit for the benefit of the particular litigants". *Rice v. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U.S. 70, 74, 99 L. Ed. 897, 75 S.Ct. 614 (1955). This Court in *Rice v. Sioux City* relied on the words of Mr. Chief Justice Taft:

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[2] "Pet." refers to Petitioners' Petition for Writ of Certiorari and "Pet. App." refers to the Appendices of the Petition.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

Rice v. Sioux City, *supra*, 349 U.S. at 79 quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The federal question of law proffered by Petitioners is one which would inure to their benefit only and which is not of importance to the public. For this reason alone, Petitioners Petition for Writ of Certiorari should be denied.

2. THE COURT OF APPEALS' DECISION COMPORTS WITH THE LANGUAGE AND PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE CASES DECIDED THEREUNDER.

Petitioners devote much of their Petition arguing the merits of the case (Pet. App. 16, 18, 20-23)—matters not relevant in the jurisdictional issue decided by the Seventh Circuit Court of Appeals. As stated by the Court of Appeals, "Our finding that Greece is not immune from suit does not prejudge any choice of law question which Greece may wish to assert on remand" (Pet. App. A-18), and by the District Court, "The present rulings, however, leave wholly open the merits of the dispute, . . .". (Pet. App. B-10, n.4) *See*, 28 U.S.C. §1606; H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 12, *reprinted in* 1976 U.S. Code Cong. & Ad News 6604, 6621.

On the merits of the sovereign immunity issue the Court of Appeals correctly concluded that "our resolution of the current Appeal is . . . a fairly straight-forward matter" (Pet. App. A-4), and unanimously held that "Greece's execution of the contract at issue in this case constituted commercial activity within the meaning of the FSIA" (Pet. App. A-15). The Court found Petitioners' argument, "that the contract can only be viewed as one small part of the Greek government's fulfillment of its constitutional obligation to provide for the health of its people", would "impermissibly depart from the 'nature' of Greece's conduct, and instead focus primary attention on the 'purpose' for which Greece entered this particular agreement." (Pet. App. A-13).

In reaching its decision, the Court of Appeals followed Congress' directive in the Foreign Sovereign Immunities Act ("FSIA") that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose". 28 U.S.C. §1603(d). Accordingly, the Court of Appeals correctly found that "[t]he source of funds to finance a particular transaction is irrelevant to the transaction's essential nature . . . [and that] the administrative trappings which may surround Greece's reimbursement scheme are ancillary to the 'basic exchange' at issue here—an undertaking to reimburse for health care services performed." (Pet. App. A-14 and A-15).

The Court of Appeals' determination comports with prior determinations of that Court and other Courts of Appeal, and Petitioners fail to make any showing that the Seventh Circuit rendered a decision in conflict with any other decision. *See Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987) (court considered the

purpose of the activity so far as was absolutely necessary to define the act in question and found nature of transaction involved a contract for product marketing services, a commercial activity); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548-50 (D.C. Cir. 1987) (court focused on the "basic exchange" and found contract between Bolivia and plaintiff corporation for plaintiff's services in designing and implementing a comprehensive program of development of Bolivia's vital areas was "of same character as contract which might be made by a private person" and fell within commercial activity exception to FSIA); *Tifa Ltd. v. Republic of Ghana*, 692 F.Supp. 393 (D. N.J. 1988) (state of Ghana's promise of exemption from import duties and waiver of mandatory cash margin, although apparently governmental activities, were ancillary to alleged promise to pay for goods and equipment used in nationwide pesticide project, and thus conduct of Ghana was "commercial activity" within meaning of FSIA).

The Court of Appeals also properly rejected Petitioners' argument that the activity in question is peculiarly within the realm of governments. The Court correctly found that private parties routinely enter into contracts to reimburse health care providers for medical services performed on third parties. (Pet. App. A-12 and A-13). The Court of Appeals also correctly relied on the fact that Congress, in the legislative history of the FSIA, mentioned on several occasions that contracts for the purchase of goods or services were activities that would normally be considered commercial. *See* H.R. No. 94-1487, 94th Cong., 2d Sess at 16, *reprinted in* 1976 U.S. Code, Cong. & Ad. News 6604; *Segni, supra*, 835 F.2d at 163; (contracts for the purchase of goods or services . . . ought normally be considered commercial"); *Practical Concepts, supra*, 811 F.2d

at 1549 (a contract between a foreign state and a private party for the purchase of goods or services . . . may presumptively be, but is not inevitably, 'commercial activity').

CONCLUSION

None of the criteria for certiorari review by this Court are present in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HUGH C. GRIFFIN *
WILLIAM C. ANDERSON
CATALINA J. SUGAYAN
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

Attorneys for Respondent
RUSH-PRESBYTERIAN-ST. LUKE'S
MEDICAL CENTER

* Counsel of Record

APPENDIX

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1602 *et seq.*

§1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or any agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§1605. General exceptions to the jurisdictional immunity of a foreign state

(a) Ã foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the

United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * *

§1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.